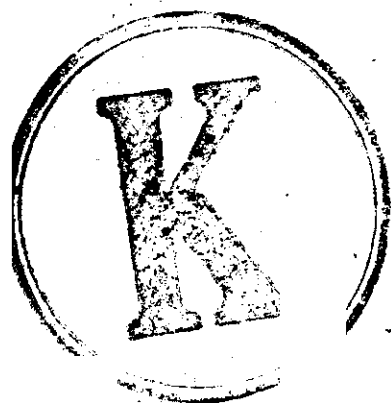




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File No.

O. Leases / 49

Legal Dept.

A BRANCH

Subject:— Opinions in Connections
With the Leases.

P-72
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File No.

O. Leases / 49

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C O N T E N T S

Legal Department File No. O. Leases /49

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Office of the R.L.A

In his opinion No 8789, dated 29-8-1947, the R.L. A. has held that the fact that no formal lease has yet been executed would be no valid ground to justify Government's rescission of contract. It would not therefore be possible to postpone the execution of the lease or commencement of the lease by indefinitely delaying the delivery of possession of the land . If Government, without sufficient reasons, delays the fulfilment of the contract Mr. Bhadani may sue Government for specific performance or for damages (see R.L.A's statement of the case and Advocate General's opinion No. 5, dated 5-1-1948).

Sd/- P.M.Lad

e.c.

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Remembrancer of Legal Affairs..

618

U.R. to R.D., No. 62¹⁸, dated the 18th January 1949.

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Office of the R.L.A.

Under clause 2 of the Lease dated 7.11.1870 the Grantee is bound at all times during the continuance of the terms, at his own cost, to make, construct, put in repairs, and maintain and keep in proper repairs any embankments, sluices, dams and works of a like nature which were then or which at any time thereafter shall have been made or constructed on any part of the demised premises or which shall be necessary in the opinion of Government for the security and protection of the demised premises or any part thereof. Clause 9 of the Lease provides that if the Grantee shall not well and truly observe and perform all and every the covenants, clauses, conditions ~~and provisions~~ and provisos in the said Lease contained and on the part of the Grantee to observed and performed then and in either or any of such cases it shall be lawful for Government to re-enter upon the demised premises and every part thereof and thenceforth to have repossess and enjoy the same as if the Lease had never been made.

If the Grantee has failed to make, construct, put in repairs and maintain and keep in proper repairs the embankments, sluices, dams and other works of like nature which in the opinion of Government are necessary for the security and protection of the demised premises, the Grantee has committed a breach of the conditions. It will therefore be possible for Government to give him a notice pointing out the specific breaches and to call upon him to remedy the breaches within a reasonable time and on default to terminate the Lease and resume possession.

The Lease however does not contain any provision authorising Government to carry out such construction-works ~~or~~ or repairs at the cost of the Grantee. In the absence of a distinct stipulation to that effect a landlord has no right to enter his tenant's premises to repair them.

Further in an action for non-repair the proper measure of damages is not the amount that ~~xxxxxx~~ may be required to put the premises into repair but the amount by which the reversion is depreciated in market value by reason of the premises being out of repair. and amount which might be practically equivalent to nominal damages in the case of a Lease having many years to run as in the present case.

The proper course would, therefore, be to give notice as suggested above and if necessary, to terminate the Lease and then to claim damages for non-repair.

Sd/- P.M.Lad.
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Remembrancer of Legal Affairs.

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* P.S. (Mr. Kumar)

2583
7/3/1949

Office of the R.L.A.

Damage caused to
villagers in
exercise of
liberties by the
lessee of the
reclaimed land.

In his report dated the 29th January 1949 at page
43, the Collector of Breach observes:-

"There was no complaint whatsoever about the damage to the surrounding lands on account of insufficient drainage of waterways in the bund upto 1927 when the lessee repaired and reduced the size of 13 sluice gates from 5' x 4' to 5' x 2'. Thus the damage as not caused by the work of reclamation done before 1882. The lessee, however, in exercise of the liberties granted to him has made alterations and repairs in the bund according to his own convenience so that the waterway was reduced by 50 per cent resulting in damage to the surrounding fields".

The R.L.A. is requested to advise whether the damage to the surrounding fields can be said to have been caused on account of the exercise of the liberties granted to the lessee and whether it can be said to be a breach of condition 3 of the lease.

Condition 3 of the lease relates to the damage caused to the surrounding lands or premises in carrying on the said work of reclamation or in exercise of any of the liberties thereby granted. Condition 4 provides that the lessee ~~shall make~~ shall make reasonable compensation to any tenant or tenants, occupier or occupiers of such surrounding lands and premises as aforesaid and to any other person or persons whomsoever for any damage or loss which may be sustained by him or them by reason or in consequence of the said reclamation works or the exercise of the liberties hereby granted or in any wise in relation thereto or to any matter or thing which may be done in pursuance of these presents so far as any such tenant or occupier or other person shall be entitled to such compensation. As stated by the Collector, the damage to the surrounding lands has not been caused in carrying on the said work of reclamation. The next question

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for consideration would, therefore, be whether the damage has been caused to the surrounding lands in exercise of any of the liberties granted by the lease. What these liberties are have not been stated in the lease but the lessee under the lease has been given a right to enjoy the demised land in perpetuity or so long as the conditions and covenants therein contained were observed. It appears, therefore, that, after the land is reclaimed, the lessee would be entitled to cultivate and enjoy the land in perpetuity and in exercise of that right he would be entitled to take all measures necessary to safeguard his interest. Admittedly the sluices were narrowed down in 1927 which was obviously for the purpose of excluding the ingress of tidal or salt water. But in doing so he had no right to cause any damage to the surrounding lands. An owner of upper land has a right that the surface water shall be allowed by the owner of lower land to run naturally to it (see Subramania v. Ramchandra, 1 Madras 335; Inam Ali v. Perash, 8 Clacutta 478; Sheikh Hussain v. Elichipulusu, 49 Madras 441 and Iyer's Law of Torts, page 185). By narrowing down the gates of the sluices, the lessee has been causing the rain water to be penned back and thereby inundating the surrounding lands. It is, therefore, apparent that this water logging has been the direct result of the action taken by the lessee in reducing the waterway by 50 per cent. Consequently, he would be deemed to have caused damage to the surrounding lands in exercise of his liberty to enjoy and keep the lands safe from inundation by salt water. Conditions 3 and 4 it appears have been violated. Conditions 3 and 4 it appears have been

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substantial damage to the property, while condition 4 refers to such damage as would admit of reasonable compensation. Mere water logging may not involve any substantial damage to the property. Consequently it would be reasonable and proper to take action for the breach of condition 4 instead of for the breach of condition 3. Government may therefore call upon the lessee to make reasonable compensation to the owners or tenants of surrounding lands which have been affected by the water logging and to restore the old sluices, failing which it would be open to Government to terminate the lease after due notice.

Sd/- P.M. Lad

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Remembrancer of Legal Affairs.

U.R. to Revenue Department No. ²⁵⁵⁵~~2855~~ dated the

5th March 1949.

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Office of the R.L.A.

When Mr. Khambata saw me on 28th February, it was explained to him that it was necessary to delete clause 5 of the original draft relating to Government's contribution towards demolition value of the premises for the principal reason that it would offend against section 18 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, which penalises the receipt by landlord either himself or through any person of any consideration other than the standard rent. Mr. Khambata thereupon agreed that he would advise the deletion of this clause. But he inquired *whether in consideration of this deletion, the rent* could be raised from Rs. 50,000 to Rs. 75,000. It was explained to him that inasmuch as it was understood that the rent stipulated in clause 5 was not to be recovered, no useful purpose will be served by unduly inflating the figure. The Chief Secretary was contacted on the phone, and he too agreed that it would not be desirable to enhance the figure to Rs. 75,000. In these circumstances it is not understood why it is now proposed that the rent should be increased from Rs. 50,000 to Rs. 75,000. The R.L.A. has already explained at the conference that, despite the writing which the Company proposes to pass, the effect in law would be that Government would be liable to pay the stipulated rent, and from that point of view also it would be undesirable to increase it to Rs. 75,000.

2. I too share the Chief Secretary's difficulty regarding the statement about refund. My understanding was that in view of the legal impediments arising out of section 19 of the Act which makes it unlawful for a tenant to claim or receive any sum or consideration as a condition of relinquishment of his tenancy

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the Company was to pass a mere writing to the effect that they would not recover the rent and that the matter was to be left to the good ^{of} faith of the parties. No question of refund would, therefore, arise.

3. The Chief Secretary may kindly consider the so-called assurances/^{referred} ~~referred~~ to in paragraph 3 of the Company's letter and confirm them, if necessary. The terms of the lease have already been supplied and may now be finalised so that a draft of the lease may be taken in hand at an early date.

Sd/- P.M.Lad 12/3

O.C. Remembrancer of Legal Affairs.

U.R. to Chief Secretary No. 2892, dated the 14th March 1949.

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Dr. Jayakar's objections to the draft lease sent to the Poona University for its approval relate to:-

- (1) Gardens and their maintainance;
- (2) Finality of the decision of Govt. officials over certain matters which he proposes to substitute by an arbitration clause;
- (3) Government's consent to assignment etc. and
- (4) Other minor provisions.

1. Gardens and their maintainance. Objections on this point appear at pp.2,3,6, & 9 of the draft lease and the new clauses proposed are clauses 2(g), 4(a) & 4(b). Dr. Jayakar's proposal is that the University should be given absolute control over the gardens and on Government agreeing to pay an yearly grant of Rs. 25,000/- (which may be varied by agreement between the parties), the University will maintain the gardens and will permit the use of such gardens by the public subject to the rules to be framed by Government in agreement with the University. The proposal is in the first instance objectionable from the point of view of constitutional law. Government cannot undertake any recurring permanent liability as such grants require sanction of the Legislature from year to year. Secondly the provision regarding the variation of the grant may be exploited for extracting increased grants on the ground that the amount is inadequate for the proper maintainance and if Government does not agree to increase such grant the maintainance of the gardens may suffer. Lastly once control over the gardens is vested in the University the University may refuse to allow the same to be used by the public unless its agreement to the rules framed by Government is secured. Thus object of maintaining the gardens as a public gardens may be frustrated. It may be mentioned that the gardens of the Bombay

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university are maintained by Government and are open to public.

Remarks and modifications at pp 2 & 3. The fact that the gardens are also to be granted would not convey right of disposal over trees and shrubs particularly when the gardens are to be maintained at the cost of Government. Dr. Jayakar's contention about the future creation of a botanical or landscape garden is also without substance. If the University desires to create such gardens it will do so at its cost entirely (including their maintenance) and Government would have no objection to hand over particular gardens to the University for that specific purpose.

The liberty reserved to Government servant's is an absolute right of entry without which it would not be possible for Government to maintain the garden. This liberty is not the same as the limited right of entry for inspection under clause 2(b) which is exercisable only after reasonable notice. The objection as to the distinction between the nature of a Government Servant's right and that of the public can be met by adding the words "to enter upon the said gardens, woods, lawns, ~~parks and pleasure grounds~~ parks and pleasure grounds for the performance of their duties arising out of the Lessor's obligation to maintain the same as hereinafter provided" after the words "his servants and agents" in line 13 on p. 3

Remarks and modification at pp 6, 9, and 10 of the draft and proposed Riders 2(a), 4(a), & 4(b)

These relate to the matters already dealt with above and may not be accepted.

(2) Finality of decisions of Govt. officials and the proposed arbitration clause

At the outset it may be mentioned that Dr. Jayakar has taken no notice of the amendment slip furnished to him by the A.L.A. at the last meeting. The amendment has therefore been shown in his draft in black pencil.

It is quite usual to provide that decision of the Lessor shall be final in certain matters but that would not mean that the lessor can act arbitrarily or capriciously. The provision is intended to prevent unnecessary disputes over small issue and the Govt. officials will exercise their discretion in a judicious manner. The alterations suggested by the R.L.A. in clause 2(h) of ~~xxxx~~ the Lease may be insisted upon and the deletion of clause 2(k) may be rejected.

Proposed clause 5. No arbitration clause has ever appeared in any lease from Government to any other public body or vice-versa, It is unusual to make such a provision in leases. Further an arbitration clause does not debar the parties altogether from going to court but only requires either party desirous of going to the Court to exhaust the remedy of arbitration first.

The constitution of the Board proposed by Dr. Jayakar may also be unfavourable to Government in as much as after five years the Chancellor~~xxx~~ of the Poona University may be an elected Chancellor and not ~~be~~ the University can always outnumber the Government nominee in the Board.

(3) Government's consent to assignmet etc. Dr. Jayakar has not abandoned any point as stated by Him at p. 8. If the modifications proposed by Him in clause 2(n) are accepted it would mean that the University can alienate at any time without Government sanction so long as it is for the purposes connected with the object of the University. Since the user clause restricts the user only to such purposes, it does ~~not~~ offer any safeguard to Government but give a far too great an advantage to the University. The modifications may, therefore, be rejected.

(4) Other provisions

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(4) Other provisions.

P.2 The drainage rights reserved under the lease are reserved only to the Lessor and his tenants and not all assigns. The words "and his tenants" have been advisedly put in to avoid any contention that these rights were only personal to Government. Drainage rights by their nature imply run in of water and also of soil. The reservation is in the usual form to be found in any book of conveyancing precedents. Therefore, there modifications may not be accepted.

p. 4 The words deleted by Dr. Jayskar are not redundant as he thinks. They are intended to lay stress on the fact that the Lessors covenants will run with the land.

p. 6 Govt. official.

p. 8. ---

p. 9 The Lessors covenant for quiet enjoyment should be in the form as originally drafted. The new covenant clause ex 4(a), proposed to be substituted by Dr. Jayskar is unsound and may not be accepted

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Office of the R.L.A.

As opined by the Commissioner, Northern Division, no fine can be levied for the breach of any of the conditions of the lease. Nor can the lease be terminated as by reason of acceptance of rent for the year 1947~~47~~ 48 the forfeiture of lease is waived (see section 112 of the Transfer of Property Act). The action proposed by Revenue Department in its office note at page 5 ante would not be legally feasible. However, if Government desires to evict these lessees it would be possible to do so on the ground that there are no valid leases (see section 175 (3) of the Government of India Act, 1935). If Government decides to continue them on the lands for the full term, a condition about the levy of fine also for the breach of any of the conditions of the tenancy may be inserted in the leases to be executed by the lessees.

Sd/- P.M.Lad
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.... Remembrancer of Legal Affairs.

U.R. to R.D., No. 1269, dated the 3rd February 1959.

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Office of the R.L.A.

The objections raised by the Right Honourable Dr. Jayakar to the draft lease centre round three main points which have been repeatedly discussed in conferences with him and concerning which no agreed solution could so far be evolved. The issues in controversy are :

- (1) Gardens and their maintenance,
- (2) Finality of the decision of Government and in one instance of the Chief Engineer regarding certain matters, and
- (3) Government's consent to the creation of sub-interests

(1) Gardens and their maintenance:- Amendment Nos. 6.8.10.14 and 15 can be brought under this head.

Dr. Jayakar's proposal is that Government as lessor should covenant with the lessee that for the maintenance of the gardens, etc. by the lessee, the lessor shall pay annually to the lessee a certain amount left blank in the draft (which he thinks should be about Rs. 20,000 i.e. Rs. 5,000 less than what according to him would cost Government to maintain the gardens) as subsidy for the purpose, the amount being varied from time to time by agreement between the lessor and the lessee. The lessee, is to maintain the gardens, etc. in good order and condition as gardens or parks, subject to the rules made by the Government and for the time being in force with respect to the maintenance of gardens and parks and in accordance with the rules to be framed by the lessor, in agreement with the lessee, to allow members of the public to enter upon, use and enjoy the said gardens, etc., save and except such parts thereof as may under the said rules be reserved for the exclusive use of the lessee as a University from time to time. In respect of this proposal, Dr. Jayakar makes the following observations:

" It is proposed that the maintenance of the gardens, etc., as such should be the obligation of the lessee. I have already explained to Mr. Bhat and his colleagues why the University feels strongly about this matter. It should make no difference to Government whether the lessor or lessee maintains the gardens for public use, so long as this is done under strict conditions,

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see lessee's covenant (g1). This University is of opinion that whatever Government chooses to give should remain entirely under the control of the University, subject of course, to conditions relating to maintenance, upkeep and preservation. We think that such an arrangement would lead to harmonious working and also be in keeping with the dignity of a great University as this is bound to be in course of time".

In his covering letter Dr. Jayakar repeats the same observations and says that the alternations are being based upon this sentiment, which he hopes the Government will respect.

It is of course a matter of policy for Government to decide whether the gardens, etc., should be under the control and management of the University. Dr. Jayakar's proposal, contemplates that Government should in addition pay to the University an annual subsidy for the purpose of the maintenance of the gardens which he envisages may have to be varied. That proposal is objectionable from the point of view of constitutional law in that Government cannot undertake any recurring permanent liability of this kind without the sanction of the Legislature from year to year. Secondly, the qualification about varying the grant may be found inconvenient and may lead to difficulties if the University later on insist that the subsidy is inadequate and ask for an increase. Although Dr. Jayakar agrees to maintain the gardens subject to the rules made by Government in respect of the maintenance of gardens and parks, he is not prepared to give the public the privilege of a free use thereof. In the first place, rules for that purpose are to be framed by Government in agreement with the University; and it is a matter for consideration whether it would be easy to secure such agreement. In the second place, even under the rules certain parts of the gardens are to be reserved for the exclusive use of the University, which would in practice mean substantially denying to the public the use and enjoyment of these gardens, whereas Government will still be required to pay a subsidy for their maintenance. It may ----

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may be mentioned in this connection that the gardens of the Bombay University are open to the public between sunrise and sunset without any qualification and reservation in consideration of its maintenance at the cost of Government. It is a matter for consideration whether, apart from the sentiment regarding securing absolute control over the property given to them any arguments have been advanced for distinguishing the case from the gardens of the University of Bombay.

It is therefore necessary to decide--

- (i) whether the gardens, etc., should be handed over to the University but without any covenant for subsidy;
- (ii) whether they should be handed over and a subsidy given under the conditions suggested by Dr. Jayakar; or
- (iii) whether we should adhere to our original proposal of Government maintaining the gardens on the model of the University of Bombay.

Dr. Jayakar has also raised some minor points under this head. He says that "if the gardens are intended to be given away, what is the use of reserving the shrubs which constitute the gardens? Besides, supposing the University for its purposes in the course of its future development wants to create a botanical garden for its students' research or a landscape garden as a subject of study as a faculty, as it is in some modern Universities, what happens to such creation under the terms of this clause? Let Government give away the whole garden, subject to the lessee's obligation to maintain and keep it in good condition." The fact that the gardens are also demised would not necessarily convey the right of disposal over trees and shrubs; particularly the gardens are to be maintained at the cost of

Government. The lease allows full liberty to the University to carve out any portion out of the gardens and parks for any course connected with the University, be it a botanical or a landscape garden and when such gardens are to be created, to that extent the general gardens and parks will be reduced in size. For that purpose it is not necessary to reserve to the University the right over the shrubs and trees in the entire gardens.

The question of the liberty reserved to Government servants to enter upon the gardens is also linked with the question of Government's obligation to maintain the gardens. This liberty is not of the same character as the limited right of entry for inspection under clause 2(h) which is exerciseable only after reasonable notice. If Government are to maintain the gardens, it would not, therefore, be feasible to transpose the provision to clause (h) as Dr. Jayakar has done. His objection against the co-ordinate position given to the servants and members of the public can be met by adding the words "to enter upon the said gardens, woods, lawns, park and pleasure ground for the performance of their duties arising out of the lessor's obligation to maintain the same as hereinafter provided" after the words "his servants and agents" in line 13, on page 3. This addition will make it clear that the liberty given to the servants is distinct in character from that given to the public; and this provision can most conveniently figure in the clause relating to the gardens under the heading of "reservation".

(2) Finality of the decision of Government etc.

Amendments Nos. 11, 13 and 16 can be brought under this head. At the outset it may be mentioned that Dr. Jayakar has taken no notice of the amendment

slip ...

slip which was supplied to him at the last meeting which concerns the finality of the Chief Engineer's decision regarding whether the repairs are necessary. The amendment has therefore been shown in his draft in blue pencil. Dr. Jayakar also proposes to delete clause 2(k) and suggests instead an arbitration clause which will be found at amendment No. 16. He observes:

"I have borrowed this provision from the Poona University Act, section 54. It is intended to prevent the spectacle of a suit in a court between the University and its employees. If so, the reason for preventing such suits between the University and Government is much stronger. All the public appearance of litigation between a great University and the Provincial Government should in my opinion be avoided as far as possible. Many modern agreements contain such a clause, e.g. the one I settled only two days ago between the Government of India and the Deccan College Post Graduate and Research Association of Poona."

Clause 2(k) usually figures in all leases given by Government. No arbitration clause has ever appeared in any lease from the Government to any other public body or vice versa, not even when leases have been given to the Central Government. From that point of view it would be undesirable to establish a precedent of this character. Furthermore, with great respect to Dr. Jayakar, it may be said that an arbitration clause of this kind would not bar recourse to a court of law. At the most the party will get a right to demand a stay of legal proceedings and insist upon the reference to arbitration in the first instance (section 34 of the Indian Arbitration Act, 1940). The arbitration provided for by section 54 of the Poona University Act is entirely of a different character, for there we have made statutory provision barring recourse to a civil court, whereas an arbitration clause in a lease would be governed by section 28 of the Indian Contract Act and if it is intended to restrict a party absolutely from enforcing his rights under or in respect of that contract by the usual legal proceedings in the ordinary legal tribunal, to that extent it will be void. Besides, ~~the~~ the constitution of the Board as proposed

by Dr. Jayakar may eventually prove unfavourable to Government. Under section 9 of the Poona University Act, after the expiry of the first five years, there is the possibility of the Chancellor being a person elected by the Court, and in that case the arbitration tribunal will have two nominees of the University as against one of Government.

The finality given to the Chief Engineer's opinion regarding the necessity of the repairs is only for the purpose of preventing the matter from being taken to a court of law when the question arises of revocering the expenses of repairs carried out by Government.

(3) Government's consent to the creation of sub-interests. Amendment No. 12 deals with this head.—
Dr. Jayakar says : " It will be noted that I am abandoning my objection to the words 'underlet' or 'part with possession' and modify the clause in a matter (manner?) to which there should be no objection." Far from abandoning any objection, the modification makes the position worse for Government. If the modifications were accepted, it would mean that the University can alienate at any time without Government's connected with the objects of the University. The user clause restricts the user only to such purpose but does not afford any safeguard to Government against the creation of sub-interested. Clause 2(n) as originally drafted is usually to be found in leases of this kind. This again is a matter of policy whether the University should be allowed the freedom of creating sub-interests without the consent of Government for purposes connected with University.

Dr. Jayakar has suggested a few minor and verbal amendments:

Amendments Nos. 1 and 3 (page 2).— He suggests the deletion of the words "and his tenants" on page 2. The

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drainage rights reserved under the lease are reserved only to the lessor and his tenants and not to all assigns. The words "and his tenants" have been advisedly put to avoid any contention that these rights were only personal to Government..

Amendments Nos. 2 and 4 (pages 2 and 3):-

Dr. Jayakar says that he does not understand what "running of soil" means. Drainage rights by their nature imply running of water and also of soil. The reservation is in the usual form to be found in any book of conveyancing precedents.

Amendments No 7 (p. 4).- The words deleted by Dr. Jayakar are not redundant. They are intended to lay stress on the fact that the lessee's covenants will run with the land and these words are usually found in all leases.

Amendment No. 9 (p. 6).- It is necessary to include the officials in clause 2(h) as otherwise every such officer would have to be expressly authorised each time for the purpose of effecting entry, etc., which will be a very cumbersome procedure indeed.

Amendment No. 16 (p. 9). The lessor's covenant for quiet enjoyment should be in the form as originally drafted. The substitute clause proposed by Dr. Jayakar is unusual and has no special justification.

Page 8- Dr. Jayakar has made a remark in the margin: "So the University suffers even in cases of 'vis major' or enemy action. In many leases it is otherwise". Presumably it is not the intention of Government to re-erect the building for the University in the unfortunate event of its destruction by 'vis major' or enemy action and unless some provision is made for re-erecting the building, the lease would

become ~~manak~~ meaningless.

o.c. ^d Sd/- P.M.Lau
 18/3

Remembrancer of Legal Affairs.

U.R. to the Chief Secretary, P. & S.D.

through Joint Secretary, E. & I.D.

No. 3068. dated the 19th March 1940.

Mjr/6/6

4 Cs.

Office of the R.L.A.

It appears that the actual lease, which was executed in 1931, was sanctioned under Government Order No. 2930 dated 13th October 1920.

The first part of the lease confines the user to that of a dargah and mosque and residential quarters for the Mujawars and care-takers employed by the Trustees in connection with the said dargah and mosque; and it is provided that if this user ceases, the Secretary of State shall be entitled to resume the said land and the buildings, erections and structures thereon by six months' previous notice etc. The second part, which relates to the land in the Second Schedule, permits the use for religious or charitable purposes connected with the said dargah and mosque only and forbids the use for any other purpose whatsoever. The use permitted by the second part is thus slightly wider. It is not clear from the papers whether the offending structures, which are used as sanatoria, are built on the land in the First Schedule or on the land in the Second Schedule. Presumably they are ^{built} ~~built~~ on the land in the Second Schedule, since the Collector has all along been referring to condition (3) in paragraph 2 of the lease. It seems that two of the structures (Nos 2 and 4) were already in existence in 1915, and the structures Nos. 1, 3 and 5 have been constructed in 1927, 1935 and 1946, respectively. Each time the plans were submitted to the P.W.D. and got approved by them.

2. In the preamble of the Government Order No. 2930 dated 13th October 1920 is printed a letter by the then Collector wherein we find the following statement:

"There are about 12 quarters occupied at a rent of Rs. 6 for 40 days by poor Mahomedan families unable to afford to leave Bombay for

health. The extended ground will enable more families to be taken in. The object is a laudable one and I have no hesitation in recommending sanction."

It, therefore, seems that Government were not only aware of the fact that there were structures already on the land which were being used as sanatoria, but wanted to encourage the extension of such structures. It is perhaps because of these structures that the purpose of the lease was extended to cover the charitable purposes connected with the said durgah or mosque. Assuming that strictly speaking the charitable purpose connected with the mosque should not include a sanatorium which is thrown open to all Mohmmadans at concessional rent, Government will be faced with this difficulty that ever since 1915, and particularly after 1920, they were not only aware of this particular purpose but acquiesced ^{assented} in the user of the land for that purpose for a ~~max~~ number of years and from time to time, and thus could be said to have waived the restrictive covenant. "A release of the covenant need not be ~~ex~~ express. If the lessor is aware of a continuing ~~breach~~ and breach and acquiesces in it for a long period, where, for instance, with full knowledge, he receives rent-it will be presumed that he has either released the covenant or granted a licence for the user." Halsbury's Laws of England, Second Hailsham Edition, Vol 20. p. 231.

3. In these circumstances a resumption will not be feasible

Sd/--P.M.Lad
o.c. 28/3
Remembrancer of Legal Affairs.

U.R. to R.D. No. 3373, dated the 29th March 1949

Mjr/6/6

4Cs.

Office of the R.L.A.

Termination of
monthly tenancy
for breach of
conditions of
the lease.
Transfer of
Property Act,
sections 108,
112.

" Partnership is a contract of two or more competent persons to place their money, effects, labour and skill or some or all of them in lawful commerce or business and to share the profits and bear the loss in certain proportions. Not only a common business but a common interest in it is essential" (see Mulla's Indian Partnership Act, pages 6-7). From the terms of the agreements at pages 55-62, ante, it appears that, although the agreements are termed as partnership agreements, they do not appear to be agreements relating to a partnership business for in all these agreements the Government's lessee is to be given a certain sum of money as his fixed share irrespective of profit or loss of the business. In other words, all these agreements appear to be clearly agreements of sub-letting the premises for a certain consideration. Consequently these agreements are clearly in contravention of clause (11) of the lease. It would have, therefore been possible for Government to terminate these leases under clause (19) and re-enter the premises. But the partnership agreements were entered into some time in January 1948 and since then it appears that Government has been receiving rent from the lessee. This receipt of rent from the lessee would amount to waiver of forfeiture within the meaning of section 112 of the Transfer of Property Act provided Government was aware that the forfeiture was incurred. It may not, therefore, be legally feasible for Government to terminate these leases on the ground that the premises were sub-let by the lessee

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L. Co.

It appears from the Labour Department note at page 65 that the lessee has not paid the rent for the last three months on the ground that he has carried out some repairs to his shops at his own expense and is, therefore, entitled to recover his expenses from the monthly rent due to Government. Under clause (f) of section 108 of the Transfer of Property Act, if the lessor neglects to make within a reasonable time after notice any repairs which he is bound to make to the property, the lessee may make the same himself and deduct the expenses of such repairs with interest from the rent or otherwise recover it from the lessor. The lease in the present case does not provide that Government should make repairs to the property. Nor has the lessee given any notice to Government requiring the repairs to be carried out within a reasonable time. Consequently, the withholding of the rent by the lessee is unlawful and would be in contravention of clause (19) of the lease. That clause provides that if any rent shall be in arrears for more than two days, etc., the Manager, Military Hutments and other Government Residential Buildings in Bombay may on behalf of the Government re-enter the said tenement and the tenancy shall thereupon terminate and the lessee shall be liable to immediate ejectment and any rent paid in advance shall be forfeited to Government. It would, therefore, be open to the Manager to terminate the lease on the ground of non-payment of rent and re-enter the premises. But, if the lessee obstructs the re-entry, Government will have to take possession of the premises through court, after giving him a notice of termination of tenancy under clause (19).

Sd/- P.M.Lad

o.c.

6/4

Remembrancer of Affairs.

U.R. to Labour Department, No 3752 dated the

7th April 1949

Mjr/7/6

4 Cs

question (of) renewal of
certificate after
expiration of the
period of renewal
of the certificate.

Bombay Mining
Concession Rules,
1941.

Rule 9 of the Bombay Mining Concession Rules, is applicable only when a certificate of approval 1941, is issued for the first time. This rule does not apply to a certificate renewed by Government under rule 10. Rule 10 provides inter alia that the period of renewal of the certificate of approval has effect from the date of expiry of the original certificate or of a previous renewal as the case may be. The certificate in the present case was renewed for the period 31-12-1947 to 31-12-1948. Since the period of the certificate already renewed has expired on 31-12-1948 it will be necessary to renew this certificate for one year from 31-12-1948 to 31-12-1949. The view taken by the Under Secy., R.D., on p. 56⁵⁶ ante is not correct.

Sd/- P.M.L.d
13/4

O.C.

Remembrancer of Legal Affairs.

U.R. to R.D., No. 4095, dated the 14th April 1949

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4 Cs.

L. Co.

Office of the R.L.A.

It is not understood under what provisions of law the tenants are to be asked to deposit rent with the Collector. If it be for the purpose of negotiating a settlement with the landlord, there would be no legal objection.

Sd/- P.M.Lad

e.c

14/6

Remembrancer of Legal Affairs.

U.R. to R.D., No. 6610 , dated the 15th June 1949.

Mjr/7/6

4 Cs.

Office of the R.L.A.

Re-letting of
rooms in Development
Department Chawls.

There would be no legal objection to accepting the proposal of the Manager, Development Department Chawls. However in cases falling under classes (1) and (4) it appears safer to take ~~vacant~~^{vacant} possession of the premises through Court before recognising the present occupants as tenants, so that the old tenants can have no claim against Government for their personal effects, if any, in the premises.

O.C.

Sd/- P.M.Lad 21/8

Remembrancer of Legal Affairs

U.R. to P.W.D. No. 8838 dated the 5th August 1949

Mjr/7/6

4 Cs.

question whether the lease sanctioned can be revoked if the lessee does not agree to the approach road of 8 feet width.

Specific Relief Act, 1877-Section 22.

One of the terms subject to which the lease of the Government land in the present case was sanctioned and communicated to the lessee is:

"The Executive Engineer, Presidency Division, is being requested to take in hand at an early date the work of constructing an approach road to the plot in question is shown coloured in burnt sienna in the plan No. 21 dated 29th April 1946 enclosed. The approach road when completed will be transferred to you on the conditions mentioned in clauses (a) and (b)".

The plan enclosed shows that the access road proposed to

be constructed and handed over to the lessee is 20

feet wide. Consequently the condition of constructing an access road of 20' wide can be deemed to be one of the terms

subject to which the lease was sanctioned. It would, therefore, ordinarily be binding on Government. However, it appears

from the collector's letter No.L.N.D.-712, dated the 25th June 1947 at page 515 of the file that it is not possible

to keep the width of the approach road greater than 18' as it interferes with the structures in the compound of the

"Keverne" bungalow. It is true that the "Keverne" bungalow does belong to Government but the enforcement of the condition about the width of the approach road involves demolition of the structures in the compound of the "Keverne"

bungalow. Consequently, it is likely that the court would not grant specific performance in respect of this approach

road as it would cause great hardship to Government. Moreover, when this term was inserted, possibly the extent

of the width of the road which could possibly be provided without involving any damage to the structures in the

compound of the "Keverne" bungalow was not within the knowledge of the officer concerned. Otherwise, it could not

have been so specified in the plan. Possibly the width as 20' has been roughly stated. Section 22 of the Specific

Relief Act can, therefore be resorted to as a defence if a suit for specific performance is filed.

It appears that there is no lease executed between the parties, nor is there any agreement of lease executed between them. The terms of the lease were communicated by

the Collector by his letter No, L.N.D.-712, dated the 13th September 1946. That letter does not disclose that the Collector in communicating the terms of the lease acted on behalf of Government. At least the Collector has not so signed the letter. In the circumstance, Government can refuse to complete the lease for non compliance with the provisions of section 175(2) of the Government of India Act, 1935, if the lessee is unwilling to accept the lands with the access road of 16' width as proposed by the Collector.

Sd/- P.M.Lad 20-8
o.c.
Remembrancer of Legal Affairs.

U.R. to R.D., No. 9406, dated the 22nd August 1949.

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Unfortunately, the facts have not been clearly stated by the Revenue Department. The question raised for the R.L.A.'s consideration by the Revenue Department is 'whether there is any breach of the conditions of the lease of the land specified in G.R., H.D. (E.R.) No 1654-Pol dated the 9th November 1936 and if so, would it warrant cancellation of the grant ?'

2. From G.R., H.D. (E.R.) No. 1654-Pol. dated the 9th November 1936, it is not clear subject to what conditions the land covered by that G.R. was granted. From the Collector's letter at page 7 it appears that the property bearing City Survey No. 32 was allowed to be used by the Rt. Rev. Leo Mourin, S.J., R.C. Vicar Apostolic of Bombay, at a concession rate of assessment subject to the condition that in the event of a breach of the condition that is, diversion of its use for any other purpose, the concession would be withdrawn and the land would be liable to the full assessment (see Indenture at pages 61-66 ante). The Collector has stated that some of the land covered by the indenture has been used for the purpose other than that authorised by the indenture and consequently the land would be liable to full assessment. Under this indenture the question of cancelling the lease would not arise.

3. The property bearing C.S. No. 707, as stated by the Collector, is held by the Arch Bishop of Bombay on a lease for 999 years from the Improvement Trust. It is not known subject to what conditions that lease was granted. However, that is a matter between the Arch Bishop of Bombay and the Improvement Trust. Under G.R., H.D. (E.R.) No. 1654-Pol. dated the 9th November 1936, on the representation made by the Arch Bishop of Bombay, the Government directed that as a special case the whole amount of Rs. 10,133-15-6 paid as building grants to the school should not be recovered but that

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the

the sum of Rs. 4,5000 only representing the depreciation value of the grants should be ^{recovered} recovered and if the premises ceased at any time to be used for the purposes of theological seminary it would be open to Government and the Governor-in-Council to demand repayments of the balance amounting to Rs. ⁵⁶³⁸ ~~6534~~-15-6 (see pages 9 and 10 ante). If Government considers that the premises are not being used for the purpose of a theological seminary it would be competent for Government to demand the balance of Rs. 5,638-15-6 from the Arch Bishop of Bombay.

o.c.

Sd/- P.M.Lad 30/10

Remembrancer of Legal Affairs.

U.R. to R.D. No. 12266 dated the 1st November 1949.

Mjr/7/6

4 Cs.

Office of the R.B.A.

Transfer of
rooms in
Development
Department
Chawals to the
Sub-Tenants.

If the tenant is alive, a surrender of the lease may be taken from him and then the sub-tenant may be recognised as tenant. The procedure stated in sub-paragraphs (1) and (2) of the letter at p. 25 ante would not be legally sufficient to extinguish the rights of the tenant. The tenant should therefore be asked to execute a surrender of the lease and get it registered.

If the tenant is dead the sub-tenant may be recognised as tenant, as no succession certificate would be feasible in such cases.

Sd/- P.H.Lad
o.c. 10,

Remembrancer of Legal Affairs.

U.R. to P.W.D. No..143856-dated the 12th December 1949.

Mjr/7/6

4 Cs.

Lease
to M/s Salebhoy T
Tyabjee Implied
surrender of

It appears that a lease in perpetuity was granted to Messrs. Salebhoy Tyabjee in 1913 of certain Khas lands in the villages of Bhagal, Malwar, Bigri and Untri in the Bulsar Taluka of the Surat District for the purposes of reclamation. As the lessees had failed to put up bunds properly and as those bunds had deteriorated due to their negligence, Government decided to cancel the lease for non-payment of rent. Unfortunately, the Revenue Authorities had in the meanwhile received the rent, and therefore Government could not take effective steps to determine the lease. However, in view of certain negotiations between ^{lessees and Government}, Government decided to grant them a new lease, for a period of 30 years from 25th September 1939 in substitution of the old perpetual lease, whereafter further negotiations were carried on with the lessees to determine the conditions of the lease. Finally, Government, by their letter No. 10145-B-28 dated the 9th June 1942 informed the lessees that the new lease would be granted on conditions stated in Government letters dated 30-9-40, 27-8-41 and 12-3-1942 in substitution of the perpetual lease held by them. By their letter dated the 14th July 1942, the lessees communicated to Government their final acceptance of the conditions of the lease proposed and forwarded to the lessees for execution, but on some pretext or another they have avoided executing that lease. The question raised for the R.L.A.'s consideration is whether, in view of these circumstances, it would be competent for Government to treat the old perpetual lease as determined and to take action on the assumption that a new lease, on the conditions proposed by Government and accepted

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by

by the lessees, has come into existence.

2. Although the provisions of the Transfer of Property Act are inapplicable to the leases of Government lands, still the general principles contained therein would apply. Under section III of the Transfer of Property Act, a lease of immovable property determined under certain circumstances two of which are: (1) by express surrender and (2) by implied surrender. According to English Law express surrenders are required to be in writing. No such formality is necessary in India and a deed of surrender need not be registered if there are facts de hors. (See Singeshwar Jha v. Ajab Lal (1940) 190 I.C. 746). There is no surrender in the present case as there is no yielding up of possession which appears to be essential. Implied surrender occurs (i) by the creation of a new relationship or (ii) by relinquishment of possession. If the lessee accepts a new lease that in itself is a surrender of the old lease for the new lease could not be granted unless the old lease was surrendered. (See Crowley v. Vitty 1852) 7 Exchange. 319 ; Upendra Singh v. Meghnalli Singh 1939. 18 Patna. 370). When a document though in form an agreement to lease finally ascertains the terms of the lease and gives the lessee a right of exclusive possession either immediately or at a future date the document is said to effect an actual demise and it operates as a lease. (See Mulla's Transfer of Property Act. p. 642).

3. In the present case it was expressly stated in the conditions offered to the lessees by Government in their letter dated the 9th June 1942 that those terms were offered in substitution of the present ^{lease} ~~lease~~ i.e. perpetual lease- and that the renewal of the lease was for 30 years from the 25th September 1942.;

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The terms of the new lease were unequivocally accepted by the lessees in their letter dated the 14th July 1942. Reading Government's letter dated the 9th June 1942 and the Lessee's reply dated the 14th July 1942, it would be apparent that there was an implied surrender of the perpetual lease and a fresh lease was granted by Government to the lessees. Consequently, there would be no legal objection for Government to treating the perpetual lease as impliedly surrendered by the lessees. Government can, therefore, take action under the terms of the new lease even though the lease has not been formally executed.

Sd/- P.M.Lad
12/2/

o.c.

Remembrancer of Legal Affairs.

U.L., to R.D. No. 12456. dated the 13th December 1949.

Mjr/7/6

4 Cs.

Office of the R.L.A.

Although the provisions of the Transfer of Property Act are not applicable to the leases of Government lands, still the principle contained in clause (g) of section ~~III~~^{III} of ~~that~~ Act will have to be followed. Consequently it would be necessary to give a show cause notice to the lessee before forfeiting the lease.

Sd/- P.M.Lad
9/1

O.C.

Remembrancer of Legal Affairs.

U.R. to R.D. No. 388 dated the 10th January 1950.

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L. Cs.